



ALAN WILSON
ATTORNEY GENERAL

February 3, 2014

The Honorable William G. Herbkersman
Member, House of Representatives
308B Blatt Building
Columbia, SC 29201

Dear Representative Herbkersman:

Attorney General Alan Wilson has referred your letter of September 23, 2013 to the Opinions section for a response. The following is our understanding of your question and the opinion of this Office concerning the issue based on that understanding.

Issue: Do S.C. Code § 33-31-620 and § 33-31-621 concerning resignation and termination in a nonprofit corporation apply to a nonprofit corporation that is also a property owner's association?

Short Answer: Yes, S.C. Code § 33-31-620 and § 33-31-621 regarding resignation and termination apply to a South Carolina nonprofit corporation such as a homeowner's association incorporated pursuant to S.C. Code § 33-31-101 et seq. and registered with the South Carolina's Secretary of State's Office.¹

Law/Analysis:

The South Carolina Nonprofit Corporation Act of 1994² provides that:

...
SUBARTICLE C: RESIGNATION AND TERMINATION

SECTION 33-31-620. Resignation.

(a) A member may resign at any time.

(b) The resignation of a member does not relieve the member from any obligations the member may have to the corporation as a result of obligations incurred or commitments made before resignation.

¹ S.C. Code § 33-31-180 concerns religious corporations. Based on the information provided, it is this Office's understanding your question does not concern a religious nonprofit corporation.

² S.C. Code § 33-31-101 (1976 Code, as amended) states: "[t]his chapter may be cited as the South Carolina Nonprofit Corporation Act of 1994." "[E]xcept for those nonprofit corporations which are governed exclusively by the provisions of Chapter 31 of this title [Title 33], Chapters 1 through 20 of this title [Title 33] apply to every domestic nonprofit corporation and to any other foreign nonprofit corporation which is authorized to or transacts business in this State except as otherwise provided in Chapters 1 through 20 of this title or by the law regulating the organization, qualification, or governance of the nonprofit corporation." S.C. Code § 33-20-103 (1976 Code, as amended).

SECTION 33-31-621. Termination, expulsion, and suspension.

- (a) No member of a public benefit or mutual benefit corporation may be expelled or suspended, and no membership or memberships in such corporations may be terminated or suspended except pursuant to a procedure that is fair and reasonable and is carried out in good faith.
- (b) A procedure is fair and reasonable when either:
- (1) the articles or bylaws set forth a procedure that provides:
- (i) not less than fifteen days prior written notice of the expulsion, suspension, or termination and the reasons therefore; and
- (ii) an opportunity for the member to be heard, orally or in writing, not less than five days before the effective date of the expulsion, suspension, or termination by a person or persons authorized to decide that the proposed expulsion, termination, or suspension not take place; or
- (2) it is fair and reasonable taking into consideration all of the relevant facts and circumstances.
- (c) Any written notice given by mail must be given by first class or certified mail sent to the last address of the member shown on the corporation's records.
- (d) A proceeding challenging an expulsion, suspension, or termination, including a proceeding in which defective notice is alleged, must be commenced within one year after the effective date of the expulsion, suspension, or termination.
- (e) A member who has been expelled or suspended may be liable to the corporation for dues, assessments, or fees as a result of obligations incurred or commitments made before expulsion or suspension.

SECTION 33-31-622. Purchase of memberships.

- (a) A public benefit or religious corporation may not purchase any of its memberships or any right arising therefrom.
- (b) A mutual benefit corporation may purchase the membership of a member who resigns or whose membership is terminated for the amount and pursuant to the conditions set forth in or authorized by its articles or bylaws. No payment shall be made in violation of Article 13.

SUBARTICLE D: DERIVATIVE SUITS

SECTION 33-31-630. Derivative suits.

Derivative suits may be maintained on behalf of South Carolina corporations in federal and state court in accordance with the applicable rules of civil procedure.

HISTORY: 1994 Act No. 384, Section 1.

S.C. Code § 33-31-620 through § 33-31-630 (with titles and emphasis added). Pursuant to the South Carolina Nonprofit Corporation Act, S.C. Code § 33-31-206 and the official comments state:

- (a) The incorporators or board of directors of a corporation shall adopt bylaws for the corporation.
- (b) The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation.

OFFICIAL COMMENT³

A nonprofit corporation is required to adopt bylaws. The term “bylaws” has a broad meaning. See section 1.40(3). Failure to adopt bylaws will lead to much confusion and uncertainty about the internal structure and organization of the corporation. However, failure to adopt bylaws will not affect the de jure status of a corporation.

The bylaws may contain any provision regulating and managing the affairs of the corporation not inconsistent with law or the articles. If a nonprofit corporation has members, its bylaws frequently contain detailed provisions dealing with their characteristics, qualifications, rights, limitations and obligations. Such provisions may relate to voting rights procedures governing admission, expulsion, suspension and other matters. The bylaws may either specify the exact number of directors or specify that the number of directors may be fixed within a stated range by the board or the members. Additional provisions that may appear in bylaws include: provisions for distribution of assets on dissolution in addition to those required by the articles (see section 2.02(a)(7)); levying dues, fees and assessments; setting the fiscal year; notice and the mechanics of meetings of directors and members; indemnification of officers, directors and agents; conventions and appointing delegates, if any; the authority of the officers and the executive director, if any; procedures to be followed in regard to checks and bank accounts; keeping and inspecting corporate records; and provisions, not inconsistent with the Model Act or articles, for amending the bylaws.

The incorporators or initial directors should adopt the initial bylaws of a corporation prior to the admission of members. The Model Act contains specific procedures that must be followed to amend the bylaws or to repeal them and adopt new bylaws. See sections 10.20-10.22.

(Emphasis added). Therefore, a nonprofit corporation must adopt bylaws, but the bylaws may not conflict with the laws governing nonprofit corporations. Id. This Office issued an opinion in 2011 in which we stated:

The preceding statute [S.C. Code § 33-31-1602] is part of the South Carolina Nonprofit Corporation Act of 1994 (“Nonprofit Act”), S.C. Code sections 33-31-101 et seq., which generally governs the establishment, organization, and operation of nonprofit organizations.⁴ Thus, we interpret your question as one concerning the validity of the bylaws of a nonprofit corporation under State law.

South Carolina courts have recognized the general rule that the bylaws of a corporation are invalid to the extent they are inconsistent with State law. See King v. Ligon, 180 S.C. 224, 185 S.E. 305 (1936) (“All resolutions and by-laws must be conformable and subordinate to the general laws”); Davis v. S.C. Cotton Growers' Co-op. Ass'n, 127 S.C. 353, 121 S.E. 260, 261 (1924) (“Bylaws regulating in a

³ “The Official and South Carolina Reporters' Comments are intended to assist those who use and interpret this act to determine the intention of the drafters and the interrelationship between the various sections. As such, the comments serve the same function and purposes as the comments to the Uniform Commercial Code, Title 36, of the 1976 Code. They can be useful particularly in a state like South Carolina because the State does not have a large body of nonprofit corporation case law. The comments are not, however, part of the statutory law and, therefore, are not binding on any court or other adjudicatory body.” S.C. Code § 33-31-101: South Carolina Reporters' Comments.

reasonable manner, the method of voting at corporate elections will be sustained, if their provisions do not conflict with the charter or statute”); Lovering v. Seabrook Island Property Owners Ass'n, 289 S.C. 77, 82, 344 S.E.2d 862, 865 (Ct. App. 1986) aff'd as modified, 291 S.C. 201, 352 S.E.2d 707 (1987) (“A corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and any by-laws made pursuant thereto”); Ortega v. Kingfisher Homeowners Ass'n, Inc., 314 S.C. 180, 182-83, 442 S.E.2d 202, 204 (Ct. App. 1994) (provision in association's bylaws calling for up to five directors with staggered terms violated statute requiring at least nine directors in order to stagger terms); see also 18 C.J.S. Corporations § 163 (“by laws inconsistent with statutory law, the common law, or with public policy or good morals, are void”).

The general rule that a corporation's bylaws must be consistent with State law has also been codified by the General Assembly. See § 33-3-102(3), (15) (every corporation generally has power to adopt bylaws or do any other act not inconsistent with State law). The Nonprofit Act describes the general powers of a corporation, in pertinent part, as follows:

Unless its articles of incorporation provide otherwise, **every corporation ...has the same powers as an individual to do all things necessary or convenient to carry out its affairs, including, without limitation, power:**

....

(3) **to make and amend bylaws *not inconsistent* with its articles of incorporation or *with the laws of this State* for regulating and managing the affairs of the corporation;**

....

(18) **to do all things necessary or convenient, *not inconsistent with the law*, to further the activities and affairs of the corporation.**

§ 33-31-302 (emphasis added); *see also* § 33-31-206(b) (“The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation”).

Op. S.C. Atty. Gen., 2011 WL 6959369 (December 21, 2011).

In addition to adopting bylaws, every nonprofit corporation in South Carolina must elect to be a public benefit corporation, a mutual benefit corporation, or a religious corporation. S.C. Code § 33-31-202 (a)(2). Regarding resignation rights in nonprofit corporations, it should be noted that South Carolina law states:

(a) A public benefit or religious corporation may not purchase any of its memberships or any right arising therefrom.

(b) A mutual benefit corporation may purchase the membership of a member who resigns or whose membership is terminated for the amount and pursuant to the conditions set forth in or authorized by its articles or bylaws. No payment shall be made in violation of Article 13.

(c) Where transfer rights have been provided, no restriction on them is binding with respect to a member holding a membership issued before the adoption of the restriction unless the restriction is approved by the members and the affected member.

S.C. Code § 33-31-611 (1976 Code, as amended). Without having information as to the name of the nonprofit or the election it is designated as, this Office can only bring these statutes to your attention. We hope this assists in your question. As this Office stated in a prior opinion,

The simple answer to your question is yes, nonprofit corporations have to follow the law. As this Office stated in a prior opinion:

This Office agrees with the statement ... the 'HOA [Homeowner's Association] should be under all the laws, rules and regulations that [the state of South Carolina] and the federal government already have in place.' Neither management companies nor HOAs may act contrary to the laws of this state; such entities must operate within the boundaries set forth in our Code of Law and remain bound to any contractual obligations created. However, the determination as to whether [the management] violated any code of law is factual in nature and thus, beyond the scope of this opinion and better addressed by a court.

Op. S.C. Atty. Gen., 2010 WL 2678696 (June 2, 2010) (citing Ops. S.C. Atty. Gen., 2006 WL 2849809 (September 14, 2006); 2006 WL 2382449 (July 19, 2006); 2006 WL 1207270 (April 6, 2006)).

Op. S.C. Atty. Gen., 2013 WL 3479876 (June 26, 2013).

Conclusion: S.C. Code § 33-31-620 and § 33-31-621 regarding resignation and termination apply to a South Carolina nonprofit corporation such as a homeowner's association incorporated pursuant to S.C. Code § 33-31-101 et seq. and registered with the South Carolina Secretary of State's Office. However, as stated above, please note the statute also provides transfer restrictions on nonprofit corporations depending on whether they are registered as a public benefit, mutual benefit, or a religious nonprofit corporation. This Office has not examined any documents from your nonprofit corporation, nor do we even know the name of the entity, and thus we make no assertions or validations of any specific nature. This Office is only issuing a legal opinion. Until a court or the legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,



Anita Smith Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General